IN THE

Supreme Court of the United States

October Term, 1973

No. 73-582

CITY OF PITTSBURGH,

Petitioner,

vs.

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPARD, JR., t/a Stanwix Auto Park; JOHN COMINOS, t/a Liberty Parking; JOHN STABILE and ROCCO A. DEL SARDO, t/a Wm. Penn Parking Lot; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING-CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENTS

LEONARD BOREMAN
RICHARD H. MARTIN
Attorneys for Respondents
1018 Frick Building
Pittsburgh, Pennsylvania 15219

LEONARD M. MARKS
ERIC BREGMAN
Special Counsel for Respondent Meyers Bros. Parking-Central Corporation
595 Madison Avenue
New York, New York 10022

Of Counsel:

BASKIN, BOREMAN, WILNER, SACHS, GONDELMAN & CRAIG

GOLD, FARRELL & MARKS

INDEX

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-582

CITY OF PITTSBURGH,

Petitioner,

vs.

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPARD, JR., t/a Stanwix Auto Park; JOHN COMINOS, t/a Liberty Parking; JOHN STABILE and ROCCO A. DEL SARDO, t/a Wm. Penn Parking Lot; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING-CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENTS

Questions Presented

1. Should this Court affirm the decision of the Supreme Court of Pennsylvania that a selective 20% gross receipts tax imposed by a municipality upon private commercial parking facilities, combined with privileged government

competition in the same industry, effected a taking and confiscation of respondents' property without due process in violation of the Fifth and Fourteenth Amendments?

2. Do the courts of Pennsylvania and this Court have the power to review the constitutionality of municipal tax ordinances which result in takings of private property without due process?

3. Should this Court disturb the findings of the Supreme Court of Pennsylvania that the municipal 20% gross receipts tax was arbitrary, unreasonable and excessive, could not be passed on to customers because of privileged public competition, and effected a taking of property without due process?

Counter-Statement

Respondents, some of whom are corporations and others individuals, own and operate parking lots and garages in the City of Pittsburgh, representing approximately 71% of the total parking spaces in the central business district. Respondents operate approximately 17,000 of the 18,000 private spaces in this area. The Pittsburgh Parking Authority owns and operates 25% of the spaces in this area in direct competition with respondents. The central business district, referred to as "The Golden Triangle," is the commercial and financial center of the City and contains the overwhelming majority of all commercial parking facilities in Pittsburgh (A. 280a-281a, 626a; P. 2a, 62a, 53a).*

* References designated "A" are to pages of the two volume single Appendix filed by the petitioner.

References designated "P" are to pages of the Appendix to the Petition for Certiorari filed by the petitioner on October 1, 1973.

Background Facts

On February 20, 1970, 19 days after the effective date of Pittsburgh Ordinance No. 704 (Parking Tax Ordinance) (P. 103a-110a), respondents filed a complaint in equity in the Court of Common Pleas of Allegheny County seeking to restrain the City of Pittsburgh from enforcing the provisions of Ordinance 704, and seeking a refund of all taxes paid thereunder.[1]

The Parking Tax Ordinance, which was approved by the Pittsburgh City Council on December 31, 1969, was enacted pursuant to the Local Tax Enabling Act of December 31, 1965, P.L. 1257 §§1 *et seq.*, 53 P.S. §§6901 *et seq.* (the "Enabling Act"), which was a re-enactment in substantially the same form of the Local Tax Enabling Act of 1947, Act of June 25, 1947, P.L. 1145. The Enabling Act, commonly referred to as the "Tax Anything Act," con-

1. Initially, this litigation involved a suit in equity by respondents to enjoin the collection of parking taxes imposed pursuant to Ordinance No. 704 of the City of Pittsburgh, enacted December 31, 1969, which became effective on February 1, 1970, and for a refund of taxes paid thereunder. During the pendency of this lawsuit, however, the City of Pittsburgh enacted a new parking tax ordinance, Ordinance No. 30 of 1973, effective April 1, 1973, which superseded Ordinance No. 704 (P. 23a n.13). Unlike the challenged ordinance that imposed a 20% tax upon *parking operators* on their gross receipts from each non-residential parking operation, the new ordinance imposed a tax of 20% upon *patrons*, to be collected from the patrons by the operators. As the Commonwealth Court of Pennsylvania recently observed "The City by taxing the patron [in Ordinance No. 30 of 1973] sought to cure in advance the infirmity of confiscation of the operators' property found by the Supreme Court to be suffered by Ordinance No. 704." *Wm. Penn Parking Garage, Inc.* v. *City of Pittsburgh*, —— Pa. Comm. Ct. ——, 314 A.2d 322 (1974). Respondents' request for injunctive relief has therefore been rendered moot. Respondents' right to obtain a refund for taxes paid under former Ordinance No. 704 of the City of Pittsburgh remains open. The Supreme Court of Pennsylvania remanded the case to the Court of Common Pleas to determine the "nature and extent" of the refund to which respondents may be entitled (P. 27a).

ferred broad power on municipalities to raise revenues outside of traditional property taxes.

Section 6 of the Enabling Act expressly gives standing to any party aggrieved by a municipal ordinance passed pursuant thereto to appeal to the courts, and confers jurisdiction upon the state courts to invalidate the tax or to reduce the rates:

> "It shall be the duty of the court to declare the ordinance and the tax imposed thereby to be valid unless it concludes that the ordinance is unlawful or finds that the tax imposed is excessive or unreasonable; but the court shall not interfere with the reasonable discretion of the legislative body in selecting the subjects or fixing the rates of the tax. The court may declare invalid all or any portion of the ordinance or of the tax imposed or may reduce the rates of tax." 53 P.S. §6906.[2]

In 1947, the legislature of Pennsylvania enacted the Parking Authority Law, Act of June 5, 1947, P.L. 458, §§1, 53 P.S. §§341, *et seq.* (the "Parking Authority Act"), after having determined that a parking crisis existed in Pittsburgh and other cities, which required a joint and cooperative effort between private and governmental enterprise.

---

2. The Commonwealth Court of Pennsylvania recently reviewed the basis for the Local Tax Enabling Act of 1947 in considering a challenge to the 1973 ordinance (see footnote 1, *supra*):

> "While this vast delegation of the taxing power was generally approved as necessary, it was recognized as a new departure in municipal government, as evidenced by its popular name, the 'Tax Anything Act.' The Legislature, however, chose not to confer this broad power to find and to tax subjects and objects previously beyond the reach of local tax gatherers without also according the taxed a right to judicial review of the wide discretion thus given local officials. Section 6 provides this safeguard." *Wm. Penn Parking Garage, Inc.* v. *City of Pittsburgh*, —— Pa. Comm. Ct. ——, 314 A.2d 322 (1974).

Section 2 of the Parking Authority Act (53 P.S. §342) sets forth the underlying public policy:

> "(g) That this *parking crisis,* which threatens the welfare of the community *can be reduced* by providing sufficient off-street parking or parking terminal facilities, or both * * *
>
> * * *
>
> "(i) That it is *intended that the authority cooperate with all existing parking or parking terminal facilities, or both, so that private enterprise and government may mutually provide adequate parking services for the convenience of the public.*" (emphasis added)

As one of the co-sponsors of the Parking Authority Act stated:

> "* * * I do not believe that parking should become strictly a public operation. There are people in private enterprise there now and I believe that they should be permitted to remain there and the government should not take over their facilities and drive them out of business." 1947 Pennsylvania Legislative Journal—House 2094.

The Parking Authority Act was upheld in *McSorley* v. *Fitzgerald,* 359 Pa. 264, 59 A.2d 142 (1948).

In the present case, the Supreme Court of Pennsylvania recognized that the extensive public competition with the private sector in the parking industry as it now exists in Pittsburgh is contrary to the intent of the Pennsylvania legislature:

> "As appellants emphasize it is doubtful that the state Legislature ever intended the public parking author-

ities utilizing public financing advantages, to compete directly with private parking operators in this fashion. In fact, the declaration of policy in the Parking Authority Law of 1947 specifically provides: '* * * That it is intended that the authority cooperate with all existing parking facilities so that private enterprise and government may mutually provide adequate parking services for the convenience of the public;' Act of June 5, 1947, P.L. 458 §2, as amended, 53 P.S. §342. Nonetheless Pittsburgh parking operators are now not only denied the cooperation intended in the statute, but are actually confronted with direct, adverse competition from the Public Parking Authority." (P. 21a-22a)[3]

In *Philadelphia* v. *Eglin's Garages, Inc.*, 342 Pa. 142, 19 A.2d 845 (1941) and *Philadelphia* v. *Samuels*, 338 Pa. 321, 12 A.2d 79 (1940), the Pennsylvania Supreme Court upheld a 10% gross receipts tax imposed by the City of Philadelphia on open parking lots. The court based its decisions on its findings that there was no factual basis for claims that the tax was confiscatory. There was no public

---

3. The same conclusion concerning state legislative intent had been reached by Judge Kramer writing for the minority of the Commonwealth Court:

> "Authorities [referring to the Public Parking Authority] were not instituted for the purpose of making profits and therefore should show none." (P. 74a)

In this connection, Judge Kramer also stated:

> "We can take judicial notice of the published financial reports of the Public Parking Authority of Pittsburgh, which show that it consistently has earned handsome annual profits, including the test year, 1970." (P. 72a, fn. 1)

In a closely analogous situation, when the Pennsylvania legislature intended that local Port Authorities take over all transit operations within their jurisdictions, it specifically directed them to acquire all private transit operations and pay just compensation for them. Port Authority Act, 1956, April 6, P.L. (1955) 1414, as amended by Act of October 7, 1959, P.L. 1266; 55 P.S. §551 *et seq.* at 563.1.

competition aspect in these cases since the public parking authorities had not yet been created.

In 1962, the City of Pittsburgh for the first time enacted a 10 percent gross receipts tax on all commercial parking facilities. *McGillick* v. *City of Pittsburgh*, No. 85 January Term, 1963 (Court of Common Pleas, Allegheny Co.), *aff'd per curiam*, 415 Pa. 581, 203 A.2d 481 (1964), upheld this tax in a *per curiam* opinion affirming the finding that there was "nothing in the record before us to indicate that the tax rate of 10 percent of the gross receipts is excessive or confiscatory." No claim was made concerning public competition in *McGillick* and that issue was not discussed by the Court.

On December 28, 1968, the City of Pittsburgh enacted a new parking tax ordinance, Ordinance No. 674, effective February 1, 1969, which superseded the 1962 ordinance and raised the rate of taxation on gross receipts of non-residential parking operations to 15 percent. On December 31, 1969, Ordinance No. 704, effective February 1, 1970, was enacted increasing the 15 percent tax to 20 percent of gross receipts and prompting the present litigation (P. 103a-110a).

The Facts in This Case

The facts in this case were unanimously established by the Commonwealth Court of Pennsylvania and were accepted by the Supreme Court of Pennsylvania. Each of the appellate courts agreed that "the *undisputed evidence* on this record" (P. 62a, emphasis by Court) demonstrates:

"1. There are about 24,300 parking spaces in the City of Pittsburgh. Of this number 6100 are served by a

public parking authority, subjected to this tax,[4] but exempt from other taxes including those on real estate. Of the balance of about 18,000 spaces, the plaintiffs here owned or operated about 17,000.

"2. Based upon six months' operations and a sound statistical projection for the balance of the year 1970 with expenses computed at 1969 rates, that portion of the industry represented by appellants, would, during the year 1970, earn gross revenues of over $8,000,000, pay $1,600,000 on account of this tax and sustain a loss of $270,000. Of the fourteen appellant enterprises nine would sustain losses and of the others the one showing the largest profit would earn an amount equal to only 2.9% of its gross revenues.

"3. The appellants are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates, but also because the appellants are in competition with a public authority which, exempt from other taxes, can charge less.

"4. The rate of tax was increased from fifteen per centum effective in 1969 to twenty per centum, although in 1969 the appellants lost $26,000 on gross

4. The Court of Common Pleas of Allegheny County in *Public Parking Authority, et al.* v. *City of Pittsburgh*, No. 687 July Term, 1972, has ruled that the Parking Authority is totally exempt from Pittsburgh's 20% gross receipts tax since its parking garages, being "public property used for public purposes," are exempt from all taxes. This decision has recently been unanimously upheld by the Commonwealth Court of Pennsylvania. *City of Pittsburgh* v. *Public Parking Authority, et al.*, No. 97 C.D. 1973, —— Pa. Comm. Ct. ——, 314 A.2d 887 (1974). See also *Allegheny County* v. *Moon Township*, 436 Pa. 54, 258 A.2d 630 (1969); General County Assessment Law, Act of May 22, 1933, P.L. 853, 72 P.S. §5020-204(g); Parking Authority Law, Act of June 5, 1947, P.L. 458, 53 P.S. §355. The Court below noted: "Even if the Authority had to pay the tax to the City it would mean only in reality an accounting transaction, transferring dollars from one pocket of an instrumentality of City government to another." (P. 21a, n. 9)

revenues of about $7,700,000 on which they paid a tax under this ordinance of more than $1,400,000." (P. 62a-63a)

The facts found by the Commonwealth Court were accepted by the Supreme Court of Pennsylvania and restated as follows:

"After the imposition of the 20 percent gross receipts tax appellants' projected figures for 1970 show that out of 14 different parking lot operators in downtown Pittsburgh nine would sustain operating losses. Of the five operators earning a profit only two would achieve a return of one percent or better. The highest return projected for any of the 14 operators in 1970 was 2.9 percent.

"Moreover, the evidence produced by appellants indicates that as the gross receipts tax increases from the original ten percent to the present 20 percent the percentage and number of parking lots unable to achieve any profit doubles. Again based on projections for 1970, when compelled to pay the 20 percent gross receipts tax, 65 percent of the individual lots would sustain operating losses. If the tax had remained at 15 percent, only 37 percent of the lots would fail to earn a profit. If the tax was reduced to its original ten percent, then only 30 percent of the lots would sustain losses." (P. 14a-15a)

* * *

"The Commonwealth Court unanimously agreed that the tax was imposed at an unreasonable rate * * * [and] * * * also unanimously agreed, contrary to the chancellor's findings, that 'appellants are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates but also *because the appellants are in competition with a*

public authority which, exempt from other taxes, can charge less.' " (Emphasis in opinion below) (P. 16a)

• • •

"Appellants, on this record, have shown that more than 'an occasional operator cannot afford to continue in business.' However, the chancellor found that appellants have made no significant attempt to pass the tax on to the consumer. As noted previously the Commonwealth Court was of the unanimous opinion that the tax could not be passed on to the consumer because of the competition from the Public Parking Authority. Clearly if the private parking lot operators attempted to pass the full burden of the tax on to the consumers they would only succeed in increasing the disparity in the already disparate rates. For example, at the all-day rates shown in the record, if appellants were to attempt to pass the tax on to their patrons, their rates would increase from an average of $3.00 to $3.60, while a similar tax pass-on by the Public Parking Authority would increase their average rate from $2.00 to $2.40. Thus the differential in rates would increase from $1.00 to $1.20." (P. 17a-18a)[5]

---

5. The City's reliance on the unsupported findings in the Court of Common Pleas is erroneous. Those findings were unanimously reversed by the Commonwealth Court in accordance with Pennsylvania law. *In re Lohns Estate*, 440 Pa. 268, 269 A.2d 451 (1970); *Cowen* v. *Krasas*, 438 Pa. 171, 264 A.2d 628 (1970); *Albert* v. *Lehigh Coal*, 431 Pa. 600, 246 A.2d 840 (1968); *In re Pruners Estate*, 400 Pa. 629, 162 A.2d 626, 628 (1960); *In re Liggins Estate*, 393 Pa. 500, 143 A.2d 349 (1958); *Carnock* v. *Filer*, 392 Pa. 468, 141 A.2d 195 (1958).

The factual findings of the Pennsylvania appellate courts are conclusive and should not be subject to review here. *Wolfe* v. *North Carolina*, 364 U.S. 177, 196 (1960); *Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1953); *Grayson* v. *Harris*, 267 U.S. 352, 357-58 (1925).

In any event, the record overwhelmingly supports the findings of the Pennsylvania appellate courts. See pp. 47 to 57, *infra*.

The Decision Below

The Supreme Court of Pennsylvania held that the combination of public competition in the parking industry by the Public Parking Authority, which enjoys important and wide-ranging governmentally granted competitive advantages, plus the arbitrary 20% gross receipts tax which was so excessive and unreasonable that it appropriated the entire profit of the private operators, constituted a taking without due process or compensation. Among the Parking Authority's competitive advantages cited by the court were exemptions from payment of taxes, lower interest rates, and long-term public financing:

> "• • • the Public Parking Authority is blessed with certain other legislatively bestowed advantages and able, therefore, to charge lower rates. The Parking Authority is exempt from payment of all real estate taxes because of the exclusion given to public property used for public purposes. Because lower interest rates are granted to municipal corporations seeking to borrow money, the Parking Authority is able to arrange cheaper and longer term financing. This also reduces significantly the rates charged by the Authority, and increases in intensity the degree and nature of its direct competition with the private parking lot operators. It is certainly undeniable that the Parking Authority is able to finance its site and construction costs through the attractive medium of long term, lower interest public financing, with all the benefits which attend such governmental arrangements not available to private businessmen.[6] See *Price* v. *Philadelphia Parking Authority*, 422 Pa. 317, 355, 221 A.2d 138, 148 (1966). It is the combination of these factors

6. 53 P.S. §346 (40 year tax exempt bond authorization); §349 (power of eminent domain); §355 (exemption from real, personal property and excise taxes).

which creates the extraordinary competitive advantage which the Public Parking Authority is able to exert over the non-governmental parking lot owners and operators.

"Not only is the Parking Authority able to charge lower rates than private operators, but with the enactment of the 20 percent gross receipts tax the taxing body now appropriates for itself practically all of the earnings of the private parking lot operators. By taking 20 percent of gross revenues 'off the top' the City effectively confiscates what were formerly the earnings of the parking lot owners. This confiscation is practically as complete as if the City had condemned without compensation the private lots to erect public facilities. In this situation it is unnecessary for private lot operators to prove that they cannot pass the tax on to their customers (although as previously noted the Commonwealth Court found this was not possible). See *Samuels,* supra; *Eglin,* supra. Clearly by raising their rates the private operators would greatly increase the already significant rate differential between private and public parking lots. The public competition thus effectively prohibits private lot operators from increasing their rates and passing the tax on to their patrons, while the imposed tax appropriates whatever earnings were formerly produced. Where such an unfair competitive advantage accrues generated by the use of public funds, to a local government at the expense of private property owners, without just compensation, a clear constitutional violation has occurred." (P. 22a-24a)

• • •

"It must be concluded that the unreasonably burdensome 20 percent gross receipts tax, causing the majority of private parking lot operators to operate their businesses at a loss, in the special competitive circum-

stances of this case, constitutes an unconstitutional taking of private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution." (P. 26a)

Summary of Argument

I. The highest court of the Commonwealth of Pennsylvania has properly invalidated a municipal 20% gross receipts tax, enacted pursuant to a state enabling act. The municipality, the City of Pittsburgh, seeks review. This case presents a unique and unprecedented combination of elements: (1) a 20% municipal gross receipts tax, which is so unreasonable and excessive as to appropriate to the municipality the *entire earnings* of the privately owned commercial parking industry; (2) the selective imposition of this tax solely on the parking industry, with the result that this small class is taxed thirty-four times more than any other business in the city; (3) public control of 25% of the parking market in direct competition with the private sector, using governmentally-granted privileges including broad tax exemptions and long-term low-interest public financing to undercharge the private sector and make it impossible for the 20% gross receipts tax to be passed on to patrons; and (4) an explicitly stated intent of the Pennsylvania legislature, when it authorized public entry into the parking industry, to prevent exactly the sort of devastating competition with the private sector which has arisen in Pittsburgh. The Supreme Court of Pennsylvania found that as a result of the *combination* of all these elements the 20% gross receipts tax constituted a taking without due process.

Pittsburgh's 20% gross receipts tax directly supports its own public enterprise. The City has increased the tax from 10% to 15% to 20% and thereby appropriated all of the economic benefits of ownership of the entire parking industry. It directly receives the profits from the 25% of the market which it controls. It has appropriated, through its 20% gross receipts tax, all of what were formerly the profits of the private parking operators—the remaining 75% of the market.

Pittsburgh has not outlawed the parking industry, nor has it sought to regulate it as being undesirable. On the contrary, it has found that industry of such importance that public participation is justified. Having established its own commercial enterprise in this field, the municipality improperly used its powers as a government to both compete with and selectively tax the private sector so extremely that it appropriated to itself all of the economic benefits of ownership as completely as if it had exercised its power of eminent domain. It thereby rendered worthless the previously valuable property of the private parking operators.

II. This Court has recognized that the Takings Clause* is not static, but must be construed in the context of dramatically increasing participation by government in the economy as a commercial competitor of private enterprise. Numerous cases have held that governmental activity imposing losses on individual property owners while concurrently benefiting a government enterprise constitutes

* "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution, Amend. 5.

an illegal taking and confiscation of private property. The Takings Clause provides fundamental constitutional protection against oppressive economic burdens selectively imposed on a narrow segment of the population for the benefit of the public generally.

In effect, the City of Pittsburgh has acquired full ownership of the private sector of the parking industry by its combination of arbitrary taxation and privileged governmental competition. The City could have taken over the entire parking industry through eminent domain by paying just compensation. Alternatively, it could have expended sufficiently large amounts of public funds through its Parking Authority to increase its share of the market, although this would have been contrary to the state legislature's intent. If the City had followed either of these routes, the financial burden of its political decision would have been distributed among all its citizens. Instead, the City has taken a short-cut which places the entire burden of its political decision on the private parking operators—a minute segment of its citizens. "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922).

Prior cases permitting taxation to drive out undesirable industries, or allowing public competition with private enterprise, are not applicable here because none involved the combination of selective taxation which eliminates all profits of an industry plus government enterprise competition preventing profitable private operation, all in contravention of expressed legislative intent. The City may not

constitutionally select its private competitors as targets for an excessive and crippling tax that prevents any potential profit in the entire industry so that the City's competing commercial enterprise is enhanced.

III. Both the courts of Pennsylvania and of the United States have traditionally exercised the power of judicial review of state and local tax laws to assure that constitutional rights have not been abused under the guise of taxation. The Pennsylvania legislature, in its Local Tax Enabling Act, has expressly conferred broad powers of judicial review upon its state courts to protect against municipal taxing abuses.

The decision of the Supreme Court of Pennsylvania was largely predicated on its construction of Pennsylvania's Parking Authority Law and Local Tax Enabling Act and numerous prior state decisions regarding state policy concerning municipal taxes. The record overwhelmingly supports the decision of the Supreme Court of Pennsylvania that the 20% gross receipts tax destroyed the private parking industry in Pittsburgh without any basis, and that the wide disparity between public and private parking rates made it impossible for the private sector to avoid confiscation of its former profits by increasing its charges to patrons. In anticipation of the decision below, the City's ordinance was superseded during this litigation by a new parking tax which is imposed on patrons, rather than parking operators, and applies equally to patrons of public and private parking facilities. The invalidation of the 20% municipal tax ordinance by the highest court of Pennsylvania should not be disturbed.

ARGUMENT

I

The 20 percent gross receipts tax combined with favored public competition resulted in a taking of respondents' property without just compensation.

A. The Issues Before This Court

This case presents a unique combination of three elements on which the Pennsylvania Supreme Court based its opinion: (1) a selective municipal tax found by the highest court of the state as well as its intermediate appellate court to be so excessive and unreasonable as to confiscate virtually all profits of the private sector of the industry; (2) direct and favored public competition in the same industry; (3) leading to a result in the industry directly contrary to state legislative intent and policy in authorizing public entry into the field. No prior case in this Court or in the Pennsylvania courts has presented this combination of factors.

The tax in question is not a general tax on the citizens of Pittsburgh, or its businesses or other institutions. On the contrary, the entire burden of this excessive and unreasonable tax is selectively placed on a minute segment of the business community—the commercial parking industry. As a result, this small segment of the community pays over *34 times* the taxes of any other business within the City.[7]

7. Pittsburgh's Business Privilege Tax, Ordinance No. 675 (1969), imposes a 6 mill tax on the gross receipts of all businesses in the City (A. 601a-607a). The private parking operators, who are subject to both the Business Privilege Tax and the 20% Parking Tax, pay a tax of 206 mills on their gross receipts. Stated more succinctly, the parking operators are paying 34⅓ times the taxes on all other businesses in Pittsburgh.

The issue in this case was framed by the Supreme Court of Pennsylvania as follows:

> "This controversy presents the interesting and novel question of whether the enactment, by a municipal government, of a 20 percent gross receipts tax upon all non-residential, commercial parking facilities in that municipality, combined with direct government competition in the form of a public parking authority, charging lower rates, has resulted in an unconstitutional taking and confiscation of private property without due process of law." (P. 1a-2a).

This case does *not* present the question of whether Pittsburgh has the power to tax a business—even out of existence—where the City is functioning as the regulator or arbitrator between conflicting public or private interests, and is not itself a participant in the industry in question. Nor does this case present the simple issue whether a public body may participate in activities traditionally part of the private sector in competition with private enterprise.

The sole question in this case is whether the City of Pittsburgh may determine that parking facilities are a valuable asset to the City, use governmental advantages to enter into and become one of the dominant factors in the industry, and then impose a selective, crippling tax, aimed solely at its private competitors in this limited industry, which has the effect of appropriating all of the economic benefits of ownership of the private parking facilities as completely as if the City had exercised its right of eminent domain.

The Supreme Court of Pennsylvania correctly found that the combination of an unreasonable, excessive 20%

gross receipts tax plus favored government competition constituted a taking without due process:

> "Clearly the City of Pittsburgh is acting in an enterprise capacity by operating a publicly financed parking lot which competes with private industry. To the extent that the Public Parking Authority has gained an unfair competitive edge over private parking lot owners through tax exemptions and lower rates, and more importantly appropriated an unreasonable proportion of their revenues via the gross receipts tax, a taking requiring just compensation has occurred. In the absence of any compensation a taking without due process of law results." (P. 25a, n. 14).
>
> • • •
>
> "This governmental enterprise competing with private industry adds not only a new and most significant dimension to the traditional constitutional problem of what constitutes a taking without due process but also an impermissible one." (P. 26a).

B. The General Principle: a Tax Demonstrated to Be Confiscatory Is Unconstitutional and Invalid.

This Court has repeatedly held that a tax which rises to the level of confiscation of property is invalid under the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution. There can be no question that the states, in the exercise of their taxing power, are subject to the requirements of these clauses. *E.g., Hillsborough Twp.* v. *Cromwell*, 326 U.S. 620, 623-24 (1946).

In *A. Magnano Co.* v. *Hamilton*, 292 U.S. 40 (1934), upon which the City of Pittsburgh relies, this Court recognized the principle that a state or local tax may violate

the due process clause of the Fourteenth Amendment if the taxing statute:

> "be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, *as for example, the confiscation of property.*" (emphasis added)

Similarly, in *Henderson Bridge Co.* v. *Henderson City*, 173 U.S. 592, 614-15 (1899), Justice Harlan stated:

> "It is conceivable that taxation may be of such a nature and so burdensome as properly to be characterized a taking of private property for public use, without just compensation * * * [if] such taxation by its necessary operation is really spoliation under guise of exerting the power to tax."

See also, *Heiner* v. *Donnan*, 285 U.S. 312, 326 (1932) ("That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment is settled."); *Nichols* v. *Coolidge*, 274 U.S. 531, 542 (1926) ("This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment."); *Fox* v. *Standard Oil Co. of New Jersey*, 294 U.S. 87, 100-01 (1935); *Wagner* v. *Baltimore*, 239 U.S. 207, 219-20 (1915); *McCray* v. *United States*, 195 U.S. 27, 63-64 (1904).

As the Supreme Court of Pennsylvania simply stated:

> "Undoubtedly, if a tax is shown to be confiscatory it is utterly impermissible and a violation of the Constitution." (P. 17a).

Moreover, this Court has often indicated that a state tax law which "proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—'to spoliation under the guise of exerting the power of taxing,'" will be deemed violative of the Fourteenth Amendment. *Dane* v. *Jackson*, 256 U.S. 589, 599 (1921).

The Pennsylvania courts have also long recognized that confiscatory taxation violates the Pennsylvania Constitution. In *Washington Avenue*, 69 Pa. 352 (1871), the Supreme Court of Pennsylvania declared a tax unconstitutional which assessed particular landowners in a number of townships for the building of roads that would be of a general public benefit. Holding that the power of taxation is constitutionally limited, and that confiscation of property through taxation is unconstitutional, the Supreme Court of Pennsylvania stated:

> "There is a clear implication from the primary declaration of the inherent and indefeasible right of the property, followed by the clauses guarding it against specific transgressions, that covers it with an aegis of protection against all unjust, unreasonable and palpably unequal exactions under any name or pretext. Nor is this sanctity incompatible with the taxing power, or that of eminent domain, where for the good of the whole people, burdens may be imposed or property taken.
>
> "I admit that the power to tax is unbounded by any express limit in the constitution. * * * But nevertheless taxation *is* bounded in its exercise by its own nature, essential characteristics and purpose. It must therefore visit all alike in a reasonably practicable way of which the legislature may judge, but within the just

limits of what is taxation. Like the rain it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation, extortion not assessment, and falls within the clearly implied restriction in the Bill of Rights." *Id.* at 363.

The same standard was applied to parking taxes in *Philadelphia* v. *Samuels*, 338 Pa. 321, 12 A.2d 79 (1940); *Philadelphia* v. *Eglin's Garages, Inc.*, 342 Pa. 142, 19 A.2d 845 (1941), and *McGillick* v. *City of Pittsburgh*, No. 85 January Term, 1963 (Court of Common Pleas of Allegheny Co.), *aff'd per curiam*, 415 Pa. 581, 203 A.2d 481 (1964).

In sum, both federal and Pennsylvania authorities hold that confiscatory taxation is unconstitutional and invalid.

C. The City of Pittsburgh May Not Destroy Private Parking Operations by Confiscatory Selective Taxation While Participating in Competing Operations.

Although the situation presented here has never been considered in the context of a *taxing* case, numerous cases have held that other government activity which causes losses to individual property owners *while concurrently benefiting a government enterprise*, constitutes an illegal taking and confiscation of private property.

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), for example, a private company had sold the surface rights in certain land to a town, retaining the underlying mineral rights. The Pennsylvania legislature sought to enhance

and protect its interest in maintaining public highways by enacting a statute to foster street safety. It was clear that the statute would have made it commercially impracticable for private enterprise to mine the underlying coal it owned. This Court, reversing the Pennsylvania Supreme Court, held that the statute amounted to an unconstitutional taking of property without compensation in violation of due process standards. Justice Holmes wrote:

> "It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. • • • *What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.*" (*Id.* at 414-15) (emphasis added)
>
> • • •
>
> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. • • • We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court." (*Id.* at 415-16)
>
> • • •
>
> "We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that

would warrant the exercise of eminent domain. *But the question at bottom is upon whom the loss of the changes desired should fall.*" *Id.* at 416 (emphasis added) (citations omitted)

Similarly, this Court has held that public authorities may not advance their interest in developing local air routes or airport facilities by frequent and regular flights over private property at low altitudes which impair the value of such property. Such governmental activity amounts to an unconstitutional taking of a property easement, unless the government compensates the private owners. *United States* v. *Causby*, 328 U.S. 256 (1946) (military airplanes); *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), *reversing* 402 Pa. 411, 168 A.2d 123 (county-operated airport).

Again in *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799 (1950), the government was prohibited from actively enhancing its interest in a government dam by raising the underground water table, where this actively caused economic loss to the nearby private agricultural landowners.

See also *Panhandle Co.* v. *State Highway Comm'n*, 294 U.S. 613 (1935) (pipeline company could not be required to move its high pressure lines at its own expense in order to permit government construction of a highway over its lines).

Moreover, this Court has recognized that the Takings Clause prescribes government action which too selectively imposes the burdens of government activity. In *Armstrong* v. *United States*, 364 U.S. 40 (1960), the government con-

tracted to purchase certain ship hulls. Sub-contractors on the project obtained liens against the hulls. The general contractor defaulted on his contract with the United States, the United States took title, and the sub-contractors sought to exercise their liens. The United States resisted the sub-contractors' claims on the ground of sovereign immunity. This Court held that the sub-contractors could not exercise their liens, but that the actions of the government in effectively destroying those liens, in order to promote the government's own economic interest as a purchaser of goods, constituted a taking without due process because the burden on these sub-contractors was simply too great in comparison with the benefits obtained:

> "It is true that not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense. This case and many others reveal the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are compensable 'takings' and what destructions are 'consequential' and therefore not compensable.
>
> "The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with

an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment. Neither the boats' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here." 364 U.S. at 48-49 (citations omitted).

Similarly, in *National Board of YMCA* v. *United States*, 395 U.S. 85 (1969), the fundamental constitutional protection against undue economic burdens imposed selectively on a narrow class for the benefit of the government generally was described as follows:

"The Just Compensation Clause was 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *Armstrong* v. *United States*, 364 U.S. 40 (1960); see also *United States* v. *Sporenbarger*, 308 U.S. 256, 260 (1939)." 395 U.S. at 89-90.

• • •

"For a general discussion of the purpose of the Just Compensation Clause, see Michelman, Property,

Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964)." (Footnote by the Court, *Id.* at 90, n.2.)

The *YMCA* decision endorses the analysis by Professor Sax in Takings and the Police Power, 74 Yale L.J. 36 (1964), which the Supreme Court of Pennsylvania found "indeed logical and facilitates our analysis here" (P. 24a, n. 14). The court below noted at length:

> "Professor Sax has suggested a test for determining when just compensation is due private property owners as a result of governmental activity. In Professor Sax's view government interacts with the private sector in two ways. First government 'governs,' i.e., 'it mediates the disputes of various citizens and groups within the society' and 'resolves the conflict among competing and conflicting alternatives.' *Id.* at 62. Secondly government acts in an enterprise capacity in which it acquires economic resources for its own account and thereby competes with private industry. *Id.*
>
> "Professor Sax states that: '* * * when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.' *Id.* at 63.
>
> "More specifically he adds: '* * * when an individual or limited group in society sustains a detriment to legally acquired existing economic values as

a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.' 'To be sure, the acquisition of title or the taking of physical possession will be present in the great majority of taking cases under this theory. But—and this is the important point—the presence or absence of a formal title-acquisition and/or invasion will never be conclusive. These formalities are not necessarily present when the government, as an enterpriser, is acquiring resources for its own account.' *Id.* at 67.

"Such an approach is indeed logical, and facilitates our analysis here. *Clearly the City of Pittsburgh is acting in an enterprise capacity by operating a publicly financed parking lot which competes with private industry. To the extent that the Public Parking Authority has gained an unfair competitive edge over private parking lot owners through tax exemptions and lower rates, and more importantly appropriated an unreasonable proportion of their revenues via the gross receipts tax, a taking requiring just compensation has occurred. In the absence of any compensation a taking without due process of law results.*" (P. 24a-25a, n. 14) (emphasis added)

Professor Sax's analysis is directly applicable to the present case where extreme taxation is selectively applied in order to divert all the profits of the private operators to the City, thus enhancing the City both directly through the tax and indirectly by advancing its competitive interests. As Professor Sax notes, every tax is necessarily a "taking," but that is not the end of the inquiry:

"Likewise, it is recognized that every tax technically fits the description of a taking as formulated here (just as it does, incidentally, under the old Harlan invasion theory). But here, too, the temptation to turn the proposed rule into an intellectual plaything must yield to an attempt to find workable rules for a real world. *Of course a government act is not immunized from the compensation provision of the Constitution merely because it has been labelled a tax.* But most taxes are not takings because they incorporate precisely the goal which the compensation rule is designed to achieve: they spread the cost of operating the governmental apparatus throughout the society rather than imposing it upon some small segment of it. Once that cost has been broadly diffused, though perhaps not to every member of the society nor to each in identical amount, it would seem that the essential problem of the taking provision, as delineated earlier, would be overcome.

"With these perspectives in mind, it should be possible to approach the problem fruitfully. In essence, a court ought to ask itself these questions: first, does this case raise the sort of issue with which the taking provision was designed to deal; that is, does it present a case of essentially individualized cost-bearing of some public improvement? If the answer to this question is no, as it is with most tax measures, then the constitutional issue may be dismissed forthwith. Second, is some privilege being invoked which must be recognized as an exception to the compensation rule, such as the right to impose fines in a criminal proceeding? Unless the answer here is yes, we must then go on to ask the last question: is the loss incurred here a consequence of resource-acquisition by a governmental enterprise? The response to that final question should determine the issue of compensation." 74 YALE L.J. 75, 76 (emphasis added)

In the case of the City of Pittsburgh's 20% gross receipts tax, the three elements of a taking are all present. The tax is selectively imposed upon private parking operators. Because of the favored competition at lower rates from the Parking Authority, the private operators cannot pass on the tax burden to their customers, so that the tax becomes a classic example of "individualized cost-bearing." In effect, all of the profits of this small group of parking lot operators are being appropriated for the general public good. There is no "recognized exception to the compensation" in this case. Most important, it cannot be questioned that the taxes imposed directly support a government enterprise, and the overall confiscatory effect of an unreasonable tax which cannot be passed on, flows directly from the City's competing enterprises. In Professor Sax's words this "should determine the issue of compensation."[8]

The City has taken *all* the economic benefits of the parking industry: it directly receives the "handsome" profits of its tax-sheltered public parking authority, while at the same time it appropriates to itself alone, through its confiscatory 20% tax, all the profits of the privately "owned" lots. In effect, the City thus "owns" every parking lot in its jurisdiction, although formal title to some of the lots remains in respondents' names. The City has thus "taken" respondents' valuable property as completely as if the City had condemned their parking lots for the purpose of erecting parking authority buildings.

---

8. Professor Sax further refined his analysis of the takings clause in a later article, "Takings, Private Property and Public Rights," 81 Yale L.J. 149 (1971). This second article is concerned primarily with public rights in land deriving from the need for ecological conservation and planning. It does not discuss taxation nor modify the application of his original article to the present case.

There is no doubt that a taxing ordinance which provided that private parking operators had to pay to the City 100% of the *net profits* from their business would be a patently unconstitutional taking of respondents' property without compensation.[9] The combination of the City's confiscatory 20% *gross receipts* tax and the privileged competition of its parking authority produces the same unconstitutional result—the City is receiving all of the potential profits that could possibly be made from respondents' businesses.

In sum, the City of Pittsburgh has gone far beyond its power to curtail, regulate or eliminate certain activities through its taxing and police powers. It has placed an immense and insuperable economic burden on respondents which at the same time serves to benefit directly and substantially a governmental enterprise operating in nose-to-nose competition with respondents' businesses. The City has relegated to itself alone the ability to operate nonresidential parking garages profitably, and shortly will be the sole parking lot operator within its jurisdiction. This amounts to a blatantly unconstitutional confiscation of respondents' property without compensation, due process or equal protection.

D. The Authorities Cited by the Petitioner Are Inapposite.

The City of Pittsburgh relies on cases which do not deal with the particular question presented here. First, none of the prior precedents cited in which a governmental

9. As even the dissent in the Supreme Court of Pennsylvania acknowledged. (P. 40a-41a)

entity was allowed to "curtail and hinder as well as tax"[10] involved the unique situation of government acknowledging the desirability and need for the activity by itself participating in it, while destroying private operators by direct anti-competitive and prohibitive taxation. *E.g., A. Magnano Co.* v. *Hamilton,* 292 U.S. 40 (1934) (state tax on butter substitutes); *Alaska Fish Company* v. *Smith,* 255 U.S. 44 (1921) (state tax on persons manufacturing fish oil); *McCray* v. *United States,* 195 U.S. 27 (1904) (federal tax on butter substitutes); *Fox* v. *Standard Oil Co. of N.J.,* 294 U.S. 87 (1935) (higher state tax on chain-owned service stations than on independent service stations); *United States* v. *Sanchez,* 340 U.S. 42 (1950) (tax on marijuana). These cases all involved either taxation to drive a particular disfavored industry from the taxing jurisdiction or the imposition of taxes to disadvantage one class of private business and to aid another sector of private industry.[11]

10. *United States* v. *Kahriger,* 345 U.S. 22, 27 (1953) (tax on business of accepting wages).

11. See, *e.g., McCray* v. *United States, supra,* in which the Court stated, 195 U.S. at 64:

> "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights."

(footnote continued on next page)

In the three cases repeatedly cited by petitioner—*Magnano, Alaska Fish* and *McCray*—the taxpayers challenged only the high rate of taxation of what were then considered noxious or undesirable businesses. None of these cases involved governmental competition with private enterprise, and are not applicable to this case, where the crippling 20% tax on all private operators was imposed by the City after the Pennsylvania State Legislature had specifically recognized the beneficial importance of this industry, authorized public entry to build needed additional parking facilities, and mandated cooperation between the Public Parking Authority and existing private facilities.

The second line of cases cited by the City—*Jayne* v. *City of Detroit*, 348 U.S. 802 (1954); *Gate City Garage* v. *City of Jacksonville*, 66 So.2d 653 (Fla. 1953); and *Bowman* v. *Kansas City*, 361 Mo. 14, 233 S.W.2d 26 (1950)—does not involve taxes at all, but is limited to the question of whether public competition is permitted in fields previously occupied by private enterprise. That issue has been long settled, and is not being re-litigated here. In none of these cases was there a question as to the propriety of any tax, much less a confiscatory, selective tax aimed at the private sector after the government had commenced its competing operations.

Fox v. *Standard Oil of New Jersey*, 294 U.S. at 100:

"[T]he state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held. Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. In principle there is no distinction between such an exercise of power and the statute upheld in Magnano Co. v. Hamilton, supra, whereby sales of butter were fostered and sales of oleomargarine repressed." (Citations omitted)

Similarly, in *Puget Sound Power & Light Co.* v. *Seattle*, 291 U.S. 619 (1934), upon which petitioner heavily relies, the basic issue was not whether the City's tax was arbitrary or confiscatory, but whether there was a denial of equal protection in placing *any* tax on a private light and power utility when there existed a competing government-owned public utility. That case, along with its companion, *Seattle Gas Co.* v. *Seattle*, 291 U.S. 638 (1934), was decided upon a demurrer by the City of Seattle to the respective complaints, so that there were no factual findings at all by the highest state court such as those presented here—there was no finding that the tax was unreasonable (it was 3%, compared with 20% here), or that it appropriated all of the profits of the private company; there was no finding that any private company had suffered financial losses by reason of the tax, or that its continued existence was in jeopardy; there was no finding that the public utility was favorably competing with the private utility or even serving the same customers; there was no finding that the public utility's operations conflicted with the intent of the state legislature in creating it. In short, in *Puget Sound*, this Court was not presented with a factual record detailing the combined impact of confiscatory selective imposition of a prohibitive tax plus favored government competition, contrary to state enabling legislation. In *Puget Sound* this Court only had to decide whether the imposition of *any* tax on the private sector constituted a *per se* violation of equal protection. Finally, the light and power utility in *Puget Sound* was a regulated monopoly, which has historically been held to be an especially appropriate class for tax purposes. See generally, *Rapid Transit Corp.* v. *New York*, 303 U.S. 573, 578-81 (1938) and cases cited therein.

Veazie Bank v. *Fenno*, 75 U.S. (8 Wall.) 482 (1969), is also inapposite. That case turned on a basic issue of federalism—whether the national government could tax and restrain state bank franchises under national currency powers without violating the reserved powers of the states. 75 U.S. at 547-49. The case did not involve government competition with the private sector, since both the national banks which benefited by the tax and the disadvantaged state banking associations were all private-interest corporations, and not instrumentalities of any government. 75 U.S. at 535, 538-39. *Veazie Bank's* holding that a tax may constitutionally cast a heavy burden on one class of private corporations is consistent with the later *Magnano-McCray* line of cases which permits the taxing power to be used to discourage one segment of a private industry while fostering competing *private* operations.

Similarly, *Rapid Transit Corp.* v. *New York, supra,* involved a tax on all utilities doing business in New York City. The action was brought by a number of private mass transit lines who challenged their inclusion within the class of utilities on the ground that such classification was a denial of equal protection. No question was raised of a government taking without due process, and there was no discussion whatsoever of any competition with government operations. There was no finding that there was any such competition at all. In fact, the court found that the complaining private utilities were licensed public service organizations which were protected from other private competition by statute, which "of itself (is) a sufficient advantage over ordinary businesses to warrant the imposition of a heavier tax burden." 303 U.S. at 580. The Court held:

> "Since carriers or other utilities with the right of eminent domain, the use of public property, special

franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions." *Id.* at 579.

In other words, *Rapid Transit* involved exactly the opposite situation as that presented here, since the City had there effectively granted a geographical monopoly to each of the private transit lines, protecting them from competition generally, rather than entering into competition with them itself. Moreover, when the City of New York has politically decided to assume control of mass transit lines within its jurisdiction it has not taken a shortcut and imposed the burden selectively on the private owners, it has acquired the lines directly and paid for them. *E.g., SEC v. Fifth Avenue Coach Lines, Inc.*, 289 F. Supp. 3, 9-10 (1968), *aff'd*, 435 F.2d 510 (2d Cir. 1970) (New York City's acquisition of private bus lines by condemnation).[12]

E. The Increasing Incidence and Intensity of Government Competition with Private Enterprise Place New Importance on the Takings Clause and Require Careful Judicial Scrutiny.

The crucial fact of this case, which cannot be too often repeated, is that the City of Pittsburgh, when it enacted the 20% gross receipts tax, was not acting as an arbitrator between conflicting interests in the community. The City

12. See discussion of Pennsylvania Port Authority Act at n. 3, *supra*.

of Pittsburgh does not contend here that it concluded that parking facilities were undesirable, and thereupon imposed a tax which would drive such facilities away. On the contrary, the City of Pittsburgh determined that public parking facilities were so desirable, and their control so important, that it decided to take over all such facilities within its jurisdiction. It directly acquired 25% of the facilities and imposed a tax which diverted to itself alone all of the economic benefit of the remaining 75%.

The City of Pittsburgh, through its Parking Authority, could have exercised its right of eminent domain to take actual possession of the privately-owned parking facilities. 53 P.S. §349. If it had done so, compensation would have been paid, thus placing on the general population the burden of its political decision to control all parking within its jurisdiction. The City of Pittsburgh could also have raised additional millions of dollars by issuing bonds to construct many more publicly-owned parking facilities, and may thereby effectively have cornered the market on parking within its jurisdiction, although this would have been contrary to the legislature's intent. Again, the City would have distributed the financial burden of its political decision to control parking throughout the general population through taxation to pay the interest and amortization on such bonds. But the City of Pittsburgh did not take either of the two routes just described. Instead, it took a shortcut to its desired end of control of parking facilities by building only 25% of the parking spaces and simultaneously imposing a 20% gross receipts tax on the private operators which had the same effect as condemnation. The crucial difference is that by taking the shortcut the City of Pittsburgh

passed the burden of its political decision to a tiny segment of its citizens—the private operators. Such action is precisely what the Takings Clause was designed to prevent. It is almost indistinguishable from the classic historic example which the framers of the Constitution sought to avoid—the arbitrary and oppressive obtaining of supplies for the Army and other public purposes by impression on an arbitrarily chosen small segment of the population. Tucker's Blackstone, Commentaries, 305-06 (Appendix) (1803), quoted in Sax, *op. cit., supra,* 74 Yale L.J. at 58.

This Court has become increasingly sensitive to the tremendous growth of government at all levels and the consequent conflicts between government enterprise and the private sector. Thus, for example, this Court has expanded the doctrine of standing in recognition of the economic reality of government competition and the need for judicial scrutiny of its impact on private enterprise. Compare *Hardin* v. *Kentucky Utilities Company,* 390 U.S. 1, 5-7 (1968), with *Tennessee Power Co.* v. *T.V.A.,* 306 U.S. 118, 146-47 (1939). See also *Association of Data Processing Service Organizations* v. *Camp,* 397 U.S. 150 (1970); *Air Reduction Co.* v. *Hickel,* 420 F.2d 592 (D.C. Cir. 1969).

Similarly, the Court has narrowed the immunity from the antitrust laws of government-related activity in order to protect the private sector and to foster the open market concepts underlying these statutes. Compare *Continental Ore Co.* v. *Union Carbide Corp.,* 370 U.S. 690, 707-08 (1962), with *Parker* v. *Brown,* 317 U.S. 341, 351-52 (1943), and *Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961).

This Court has properly recognized that the "takings" concept is not a technical one, but must be applied to a wide variety of governmental activity that results in injury to private property for public benefits. The thrust of the cases cited at pages 22 to 26 above is that government cannot avoid its obligation to pay just compensation by utilizing forms other than traditional condemnation to enhance its own enterprises. *E.g., United States* v. *Causby,* 328 U.S. 256 (1946), and *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962) (low flying airplanes over private property as a result of government owned airport); *United States* v. *Kansas City Life Ins. Co.,* 339 U.S. 799 (1950) (damage to private farmers caused by government dam raising water table); *Panhandle Co.* v. *State Highway Comm'n,* 294 U.S. 613 (1935) (burden of moving pipelines because of construction of government highway could not be shifted to pipeline company); *Armstrong* v. *United States,* 364 U.S. 40 (1960) (effective nullification of liens by interposition of sovereign immunity is a taking); *Brooks-Scanlon* v. *R.R. Comm'n,* 251 U.S. 396, 399 (1920) and *Railroad Comm'n* v. *Eastern Texas R.R.,* 264 U.S. 79, 85 (1924) (due process prevents state regulation which would require railroad to operate at a loss).

In the present case, the City of Pittsburgh, by its direct privileged public competition and arbitrary selective taxation of private parking operators has gone to the most extreme lengths to take the economic benefits of respondents' property and to deny them compensation. In its zeal to control this industry, however well motivated, this municipality has gone far beyond the constitutional balance struck by the takings clause between public need and private

rights. The Supreme Court of Pennsylvania correctly held that the City of Pittsburgh must either pay for the property taken or seek alternative means to achieve its desired ends which preserve this constitutional balance. As Justice Holmes presciently stated:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. at 416.

II

The doctrine of separation of powers does not apply to this case.

A. The Courts of the United States Have Traditionally Exercised the Power of Judicial Review of State and Local Tax Laws.

The City of Pittsburgh asserts that "separation of powers" requires this Court to erase the constitutional power of judicial review of municipal ordinances in the field of taxation. Petitioner relies on cases such as *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819) which were not concerned with the impact of excessive and unreasonable tax rates on businesses in competition with the governmental taxing authority and raises the spectre of the destruction of the governing body itself.

Petitioner's argument is misplaced. First, separation of powers is a federal doctrine, which, in appropriate cases, indicates that federal courts should defer to Congress and the President on constitutional challenges. It has no application to this Court's review of acts of municipalities. Second, in this case the highest court of Pennsylvania determined that Pittsburgh's selective tax was unconstitutional. The Pennsylvania Supreme Court is the final authority on the scope of its own power to review municipal ordinances in that state.

Petitioner misreads *McCulloch* and the evolution of the doctrine of separation of powers. Petitioner excerpts lengthy quotes from the *McCulloch* opinion, culminating in the well known statement of Chief Justice Marshall that "the power to tax is the power to destroy." But the reason that *McCulloch* was an historic turning point in the development of constitutional law is not Chief Justice Marshall's memorable phrase, but the holding of the case, which struck down the state tax in question and definitively established the very doctrine petitioner attacks—judicial review of the constitutionality of taxes levied by state governments and instrumentalities:

> "But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction." 17 U.S. at 427

"If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of the instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States." 17 U.S. at 431-32[13]

Were this Court to agree with the City's argument, which is strikingly similar to that unsuccessfully advanced by the State of Maryland in *McCulloch*, it would signal a departure from the traditional role of courts to implement constitutional protection against governmental abuses, reaffirmed in Justice Holmes' well-known dissent in *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928):

"It seems to me that the State Court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. *But this Court which so often has defeated the attempt to tax in certain ways can*

13. In support of its separation of powers thesis, the City also cites *Fox* v. *Standard Oil Co. of New Jersey*, 294 U.S. 87 (1935); *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550 (1935) and *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533 (1869). However, in each of these cases the court asserted its power of judicial review, and, in *Stewart Dry Goods*, actually struck down the state tax.

defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. ..The power to fix rates is the power to destroy if unlimited, but this Court while it endeavors to prevent confiscation does not prevent the fixing of rates." (Emphasis added)

This Court has reasserted the continued validity of the doctrine of judicial review as recently as March 4, 1974 in *National Cable Television Ass'n, Inc.* v. *United States et al.*, No. 72-948, 42 U.S.L.W. 4306, 4307 n.4 (March 4, 1974), which quoted Justice Holmes' formulation with approval. See also *Federal Power Commission* v. *New England Power Co.*, No. 72-1162, 42 U.S.L.W. 4308 (March 4, 1974); *Swallow* v. *United States*, 325 F.2d 97 (10th Cir. 1963), *cert. den.*, 377 U.S. 951 (1964); *United States* v. *Keig*, 334 F.2d 823 (7th Cir. 1964); *United States* v. *Acker*, 415 F.2d 328 (6th Cir. 1969), *cert. den.*, 396 U.S. 1003 (1970).

This doctrine was followed by the Supreme Court of Pennsylvania which, after reviewing the authorities suggesting that an excessive tax "standing alone" is not sufficient for judicial intervention, noted further that:

> "[T]hese same courts have acknowledged that in exceptional circumstances the taxing power of the Legislature may be abused, and, if so, it would violate both the Fifth and Fourteenth Amendments." (P. 19a)

B. The Doctrine of Separation of Powers Has No Application in This Case Since the Pennsylvania Legislature Has Expressly Conferred the Power of Judicial Review.

The Pittsburgh Parking Tax Ordinance was a municipal ordinance enacted pursuant to a delegation of power contained in the Local Tax Enabling Act of 1965 passed by the legislature of Pennsylvania. In Section 6 of that Act [53 P.S. §6906] the legislature conferred plenary power upon the state judiciary to review municipal taxes, not only with regard to the validity of such taxes, but also the reasonableness of the tax rate. As the Commonwealth Court observed in *Wm. Penn Parking Garage* v. *City of Pittsburgh, supra,* this judicial review was a necessary adjunct to protect against municipal abuse in view of the extensive new delegation of taxing power to local officials. The Commonwealth Court stated:

> "Section 6, read in the light of these principles and of the history of the legislation of which it is a part, does not offend Article 2, Section 1 of the Pennsylvania Constitution. Certainly the power to invalidate a taxing measure in whole or in part is not the power to tax. Not only have the courts long exercised this power without thought of violating thereby the separation of powers doctrine, both the Superior and Supreme Courts have reviewed and invalidated taxes in proceedings commenced under Section 3 of the Act of 1947."[14]

14. Even prior to the original Local Tax Enabling Act of 1947, Pennsylvania appellate courts held that the judicial power extended to review of the reasonableness of municipal ordinances. *Ritzman* v. *Coal Township School Directors,* 317 Pa. 271, 176 A. 447 (1935); *Pittsburgh & Allegheny Telephone Company* v. *Braddock Borough,* 43 Pa. Super. 456 (1910).

Thus, as the court below found, the Pennsylvania courts are specifically empowered to determine the validity of tax rates where, as here, the tax ordinance is imposed pursuant to the Local Tax Enabling Act.[15]

In sum, Pennsylvania law, both by express legislative enactment in the Local Tax Enabling Act and by repeated decisions of its highest court, provides for state judicial review of municipal taxing ordinances. Accordingly, the doctrine of separation of powers has no application here.

Moreover, the decision of the Pennsylvania Supreme Court turns on intricate interpretations of state law—the construction of two Pennsylvania statutes (the Local Tax Enabling Act and the Parking Authority Law), and the application of numerous prior state court decisions interpreting state policy toward municipal taxes. Since the *Samuels* decision in 1940, the Supreme Court of Pennsylvania has repeatedly reviewed municipal parking tax ordinances. Since the Local Tax Enabling Act of 1947, the Pennsylvania courts have specifically been delegated the power to review, invalidate and reduce such taxes. In the Parking Authority Law of 1947, the Pennsylvania legislature expressed the state's policy of private and public cooperation in the parking industry. In its decision in the pres-

15. The fact that, in the instant case, the matter was brought before the Pennsylvania courts in a suit in equity rather than pursuant to the specific statutory appeal procedure set forth in Section 6 of the Local Tax Enabling Act is of no consequence. The Pennsylvania Supreme Court held that the exclusiveness of the statutory appeal procedure does not apply where the taxing statute is made the subject of a constitutional challenge. *Crosson* v. *Downington Area School District*, 440 Pa. 468, 475, 270 A.2d 377, 380 (1970); *Lynch* v. *Owen J. Roberts School District*, 430 Pa. 461, 465-66, 244 A.2d 1, 3 (1968). See discussion in opinion of court below, P. 6a-8a, n. 2, 3.

ent case, the highest state court found that the operations of the municipal Parking Authority were in direct conflict with the intentions of the state legislature (P. 21a-22a). Under these circumstances, the federal courts may properly defer to the state judiciary in reviewing and invalidating a municipal tax.[16]

---

16. For example, in *Glenn* v. *Field Packing Company*, 290 U.S. 177 (1933), this Court held that the federal courts should defer to the state courts all decisions regarding the validity of state tax legislation where the taxing statute was invalidated by application of state law. There, the Kentucky Constitution established grounds for invalidating the tax independent of any federal ground. As Mr. Justice Cardozo stated in *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550, 577-578:

> "There is no need to consider in respect of an excise upon sales whether the doctrine of Magnano Co. v. Hamilton, 292 U.S. 40, 54 S.Ct. 499, 78 L. Ed. 1109, and Fox v. Standard Oil Co., supra, could be invoked successfully to uphold a destructive measure of taxation if the standard of validity were to be looked for in the Fourteenth Amendment and not in any other law. The significance of whatever distinctions there may be will be weighed when the event arises. For the present it is enough to say that, under the Constitution of Kentucky as interpreted by repeated decisions of her highest court, no tax law in the nature of an excise will be upheld if its effect is so drastic as to extinguish profits altogether. Because of those decisions, we refused only recently to sustain a statute of Kentucky imposing a prohibitory tax upon the sale of oleomargarine (Glenn v. Field Packing Co., 290 U.S. 177, 54 S.Ct. 138, 78 L.Ed. 252, affirming (D.C.) 5 F. Supp. 4), though in Magnano Co. v. Hamilton, supra, a like tax, adopted by the state of Washington, was held to be consistent with the Constitution of the nation. The relevant provisions of the Kentucky Constitution and of the explanatory judgments of her courts are written by implication into the Kentucky tax act as if put there in so many words. The act is to be interpreted as if it said: 'The tax hereby imposed is not to be collected if the result will be to wipe out the profits of a business conducted with ordinary efficiency, or to reduce the profits to a level unreasonably low.'" (dissenting opinion) (citations omitted)

III

The record overwhelmingly supports the decision of the Supreme Court of Pennsylvania.

A. The Effect of the 20% Tax

The record in this case overwhelmingly supports the conclusion of the Supreme Court of Pennsylvania that the Pittsburgh 20% gross receipts tax was unreasonable and confiscatory and, in combination with favored public competition, effected an arbitrary taking of respondents' property. The devastating impact of the tax on the entire private parking industry in the City of Pittsburgh is amply demonstrated by the financial statements contained in the record[17] (Plaintiffs' Exhibit 1, A. 496a-596a). In location after location, these statements confirm the confiscatory effect of the 20% tax in conjunction with the direct favored competition of the Pittsburgh Parking Authority. The

17. Plaintiffs' Exhibit 1, received into evidence without objection at trial (A. 59a-60a), was prepared under the direction and supervision of Donald M. McNeil, who was conceded by the Assistant City Solicitor to be a leading expert in the field of parking and traffic (A. 274a). Mr. McNeil's qualifications are set forth at length in Plaintiffs' Exhibit 12 (A. 687a). Significantly, Mr. McNeil was technical advisor to the Pittsburgh Regional Planning Association which, in 1945, prepared a report for the Allegheny Conference on Community Development (A. 278a). It was largely on the basis of this report that the Public Parking Authority Law was enacted in 1947 and the Pittsburgh Parking Authority ultimately established (A. 278a).

1970 figures[18] underscore the destructive effect of the 20% gross receipts tax:

Operator	*Number of Locations*	*Total Gross Parking Revenue 1970*	*Total Income (Loss)*	*Income as % of Revenue*	*Record Reference (Plaintiffs' Exhibit 1)*
Alco Parking Corp.	10	$1,446,446	(5,981)	—	A. 50b
William Penn Parking Lots	9	661,571	(3,703)	—	A. 51b
Parking Service Corp.	3	1,965,264	(118,887)	—	A. 53b
Arena Parking Inc.	2	404,048	729	0.2%	A. 54b
Fourth Avenue Parking Inc.	2	550,964	16,126	2.9%	A. 56b
William Penn Parking Garage Inc	1	130,613	(5,384)	—	A. 53b
Campus Parking Inc.	1	146,136	(19,048)	—	A. 54b
Grant Parking Inc.	1	320,178	(62,429)	—	A. 55b
Oliver Plaza Garage	1	282,273	650	0.2%	A. 55b
Liberty Avenue Lots	1	175,403	536	0.3%	A. 56b
Stanwix Auto-Park	3	638,895	(13,604)	—	A. 56b
Liberty Parking	7	146,380	(41,906)	—	A. 57b
Meyers Parking System	1	1,015,188	17,377	1.7%	A. 58b
K-Seven Parking Co., includes St. Francis Hospital Lot	4	285,549	(34,175)	—	A. 59b
Total Industry	46	$8,169,558	(269,699)	—	

18. The formula used by respondents' expert in rendering the 1970 projection is set forth in detail in the forward to Plaintiffs' Exhibit 1 (A. 496a-501a) as well as in the testimony of Mr. Buzzard (A. 60a-61a). Contrary to the City's claim here (Pet. Br. 39) respondents' 1970 figures were based on actual receipts and expenditures.

The Commonwealth Court unanimously found that respondents' undisputed financial figures were "based upon six months' operations and a sound statistical projection for the balance of 1970, with expenses computed at 1969 rates" (P. 62a). The Supreme Court of Pennsylvania agreed (P. 14a, n.5). The case was tried in September, 1970, before the actual receipts of the entire year of 1970 were available. Exhibit 1 contains the actual figures for 1968 and 1969 and those of the first six months of 1970.

The only projection made was that for the last six months of 1970. Since revenues through June 30, 1969 were 49.4 percent of that year's total revenues, the statistician applied precisely the same percentage to respondents' actual revenues through June 30, 1970 to project their revenue for the balance of 1970 (A. 61a-63a). Moreover, the expense side of respondents' financial statements was handled very conservatively, by using the assumption that respondents'

The uncontested figures established that the industry lost $270,000 on an $8 million gross in 1970 while paying $1.6 million in parking taxes to Pittsburgh. Only two of respondents' operations showed a return of 1% or better. Of the 46 separate parking locations, two-thirds incurred losses.[19]

Since few businesses in the United States return anything approaching 20% profits on gross receipts, it is hardly surprising that the 20% gross receipts tax has made it impossible for the parking industry in Pittsburgh to sur-

---

expenses other than taxes and wages would not increase from 1969 to 1970 and by minimizing the effect of recent wage increases (A. 64a-65a, 500a-501a). Thus, respondents' losses from parking operations for 1970 under the 20 percent gross receipts tax were actually substantially greater than those reflected in Plaintiffs' Exhibit 1.

19. Detailed examination of the financial statements of individual respondents reinforces the conclusion that the 20% gross receipts tax is confiscatory. Meyers Brothers' Chatham Center Garage, for example, increased its gross parking revenues from $967,325 in 1969 to $1,015,188 in 1970—an increase of approximately $48,000. At the same time, by more efficient management, Meyers Brothers was able to reduce its operating expenses by $12,000. Despite increased gross revenue and decreased expenses in 1970, Meyers Brothers' financial problems worsened because the 20% tax increased by over $62,000 to a staggering burden of $198,977 (A. 585a-588a). Because of this, Meyers Brothers' $1 million gross hardly produced any net profit at all. Meyers Brothers' profits dropped from 6.4% in 1968 under a 10% tax, to 3% in 1969 under a 15% tax to 1.7% in 1970 under the 20% tax (A. 585a-588a).

This pattern is reflected throughout respondents' financial documents. A typical location, Sixth and Penn Garage, indicates a 1970 gross of $370,445 with an operating loss of $23,902 at the 20% tax rate. Had the tax remained at 15%, the loss would have been $6,862. At a 10% rate there would have been a profit of $11,660, a return of 3.1% on the 1970 gross (A. 69a-70a, 503a).

The entire Stanwix Auto Parking operation with a gross of $638,895 in 1970 lost $13,604 at the 20% tax rate. At a 15% rate there would have been a profit of $15,631, a 2.4% return on the $638,895 gross (A. 70a, 564a). Total parking revenues for Alco Parking for 1970 were $1,446,446, leading to a $5,981 loss under the 20% tax. Had the tax remained at the 15% rate, there would have been a $56,755 profit, returning 3.9% of the gross (A. 71a, 503a).

vive economically. Seymour Gline, the Vice President of Meyers Parking Systems in charge of 200 national locations, testified that it was not financially feasible for a major parking operator to realize a profit with the 20% parking tax in effect (A. 268a). Moreover, Mr. Gline testified that he was not aware of any major parking operation in the United States which makes a profit of 20% of gross receipts (A. 269a). Major parking operator Harry Shepard, Jr. also testified that the 20% tax had deprived Pittsburgh's parking operators of the ability to sell or even refinance their businesses (A. 160a, 164a-165a).

Petitioner argues that the record fails to establish a confiscation of respondents' property, claiming that there was no showing that respondents' businesses are unprofitable, or that the tax cannot be passed on to parking patrons (Pet. Br. 37 *et seq.*).[20] Respondents submit that the record as a whole and Plaintiffs' Exhibit 1 (A. 496a-596a) in particular establish the total inability of all but a few of respondents' parking operations to show a profit. Both Pennsylvania appellate courts found this to be the case on the basis of "undisputed evidence" (P. 62a, 14a-16a). The City's attack on respondents' financial evidence was re-

20. The City's claim is based on its ill-conceived and belated attack on the credibility of Plaintiffs' Exhibit 1 as well as the qualifications of John S. Buzzard, who the City misidentifies in its brief as respondents' "expert witness." As previously stated in footnote 17 above, Donald M. McNeil was respondents' expert witness. John S. Buzzard was retained by Mr. McNeil to assist him in the compilation of material and preparation of the statistical exhibit received into evidence at trial as Plaintiffs' Exhibit 1 (A. 60a). Plaintiffs' Exhibit 1 was prepared on the basis of financial data supplied to Mr. Buzzard by accountants for each respondent (A. 45a). Respondents also attested at trial to the accuracy of these figures (A. 22a-23a, 199a-203a, 238a) which were not contradicted by the City. Mr. Buzzard's qualifications include extensive experience in the compilation and analysis of statistical materials (A. 41a-49a, 293a-295a). The trial court found Mr. Buzzard fully qualified (A. 56a-57a).

jected by both the Pennsylvania Commonwealth Court and Supreme Court (P. 62a, 17a-18a).[21]

21. Petitioner's brief, utilizing a shotgun approach, seeks to cast doubt on the conclusive findings of the appellate courts below. A few examples of the City's misreading of the record include the following:

(a) The claim of omissions of certain garages which distort respondents' data (Pet. Br. 37).

Four of respondents' parking operations were omitted from Exhibit 1. Inclusion of these facilities would have distorted the exhibit *in respondents' favor* (A. 133a-135a, A. 94a-95a, A. 97a-99a, A. 111a-112a). The Allegheny Center Garage financial statements, which were not included in Exhibit 1 were separately introduced in evidence (A. 609a-613a), and show an operating *loss* of $222,949 in 1969 alone. The inclusion of this tremendous loss in Plaintiffs' Exhibit 1, however, would have unfairly increased the industry's total loss, because Allegheny Center's adverse financial condition was caused by unusual factors peculiar to that parking facility. The remaining three operations not included were facilities where respondents managed parking facilities for flat fees and had no financial stake in profits or losses. In these management operations, the parking tax was irrelevant since respondents received their fixed management fees, even if the parking tax caused losses for the operations (A. 94a-95a, A. 245a-246a). The Commonwealth Court expressly and unanimously rejected the City's claim that these operations were improperly omitted (P. 62a, fn. 3).

(b) The claimed failure to calculate net profits and losses (Pet. Br. 37-38).

Respondents' net operating profits and losses from each parking facility owned or operated by them are included in Exhibit 1 (Plaintiffs' Exhibit 1; A. 496a-596a). Petitioner now claims that the exhibit should have included income and loss from property and investments not related to parking (Pet. Br. 38). Such items as apartment, office and retail store leases have nothing to do with parking operations or the 20 percent parking tax. Similarly, the City's claim that salaries to parking operators may have been inflated (Pet. Br. 38) is without the slightest support in the record. Exhibit 1 clearly contains all wages and salaries and shows no basis for any claim of inflation. The City is unable to cite a single page of the record to support its contention.

(c) The claim that gross receipts increased after tax increase (Pet. Br. 40).

The City's claim is based on erroneous and confusing testimony by its Treasurer (A. 412a-415a). The record contains no document or exhibit supporting the City's contention. Rather, the Treasurer testified concerning a compilation not offered in evidence, nor explained

(footnote continued on next page)

The City's response to respondents' demonstration that the 20 percent gross receipts tax has confiscated their property is a simplistic argument that "none of the respondents was out of business at the time of trial and all are still in business" (Pet. Br. 40).

The fact that the 20 percent tax confiscated virtually all of the profits of the respondents did not cause an immediate closing of their businesses. Respondents are obligated on long-term leases and have attempted to continue in business while seeking judicial relief. Moreover, as previously stated, the City of Pittsburgh, anticipating the results of this litigation, abandoned its tax on the gross receipts of the parking operators and imposed the tax directly on the parking patrons of both public and private facilities. See n.1, *supra*.

B. Respondents' Inability to Pass on the Tax

The City's assertion that the record contains no evidence of respondents' inability to pass on the tax is equally without merit (Pet. Br. 41 *et seq.*). First, the Pennsylvania Supreme Court, after noting that the Commonwealth Court

---

on the record, which apparently intermixed figures from three public parking authority garages with those of the private operators, thus distorting the entire calculation (A. 413a). In addition, the gross receipts figures suggested by the City Treasurer are erroneous (414a-415a). As the Commonwealth Court unanimously found, respondents lost $26,000 on gross revenues of over $7,700,000 in 1969 while paying $1.4 million in parking taxes and in 1970 respondents would sustain losses of $270,000 on gross revenues of over $8,000,000 while paying $1.6 million in parking taxes (P. 62a-63a).

(d) The claim that the comparative public and private rate study was misleading (Pet. Br. 38).

The City contends that Plaintiffs' Exhibit 7 (A. 600a, 89a) which contains comparative public authority and private rates is misleading. The City fails to note, however, that this detailed study was prepared by an independent expert *for its own Pittsburgh Parking Authority*. Plaintiffs' Exhibit 11, A. 614a *et seq.* at A. 633a.

unanimously found that the tax could not be passed on because of favored public competition (P. 16a, 23a), held that it was unnecessary for respondents to actually prove that they cannot pass the tax on to their customers. Justice Roberts reasoned as follows:

> "Not only is the Parking Authority able to charge lower rates than private operators, but with the enactment of the 20 percent gross receipts tax the taxing body now appropriates for itself practically all of the earnings of the private parking lot operators. By taking 20 percent of gross revenues 'off the top' the City effectively confiscates what were formerly the earnings of the parking lot owners. This confiscation is practically as complete as if the City had condemned without compensation the private lots to erect public facilities. In this situation it is unnecessary for private lot operators to prove that they cannot pass the tax on to their customers (although as previously noted the Commonwealth Court found this was not possible). See *Samuels*, supra; *Eglin*, supra. Clearly by raising their rates the private operators would greatly increase the already significant rate differential between private and public parking lots. The public competition thus effectively prohibits private lot operators from increasing their rates and passing the tax on to their patrons, while the imposed tax appropriates whatever earnings were formerly produced. Where such an unfair competitive advantage accrues generated, by the use of public funds, to a local government at the expense of private property owners, without just compensation, a clear constitutional violation has occurred." (P. 23a)[22]

22. As previously noted in footnote 4, *supra*, the Court of Common Pleas of Allegheny County, as well as the Commonwealth Court of Pennsylvania, have unanimously decided that the Pittsburgh Public Parking Authority is exempt from the 20% parking tax and all other taxes. *City of Pittsburgh* v. *Public Parking Authority*, —— Pa. Comm. Ct. ——, 314 A.2d 887 (1974), and authorities cited therein.

Second, the entire trial record is replete with uncontradicted evidence that the 20% tax could not be passed on to customers. For example, Peter Smith, Manager of the Meyers Brothers Chatham Center Garage, described the disastrous results of raising customers' parking rates on two prior occasions. In February, 1969, the parking tax rate rose from 10% to 15%. In an attempt to pass on this increase, Meyers Brothers' rates were raised as follows:

24 hour rate from $1.75 to $2.00
8-12 hour rate from $1.25 to $1.50.

Even this relatively minor increase in rates caused a decline in the number of cars using the parking facility (A. 239a), and eventually necessitated cutbacks in the cashier's and attendants' staff (A. 240a).

Again, in October, 1969, Meyers Brothers raised its rates to $2.25 for a 24-hour maximum and $1.75 for 8 to 12 hour parking. In this instance, business dropped off so sharply that four to five hundred parking spaces were left empty each day. Meyers Brothers was forced to lay off more personnel and to close off an entire floor of the garage (A. 241a-242a). Mr. Smith testified that when the tax rate was increased from 15% to 20%, another increase in parking rates would have resulted in Meyers having "no business whatsoever" (A. 242a-243a). In fact, Meyers Brothers was compelled to institute a lower "early bird" rate in order to draw back some of its former customers (A. 243a).

Respondents' inability to pass on the tax was further demonstrated by the privileged competitive position of the

City's Parking Authority.[23] In addition to the exemption from all taxes enjoyed by the Authority, the record repeatedly substantiates the findings of the Supreme Court of Pennsylvania that the Parking Authority's rates are pegged far below those of the private operators. For example, the all-day (10-hour) rate for seven private operations—the Stanwix Garage, the four Grant-Smithfield lots, the Oliver Plaza Garage and the Oliver Plaza lot, among

23. The City's claim that it is not responsible for the Pittsburgh Public Parking Authority (Pet. Br. 9) is utterly baseless. The Pittsburgh Parking Authority is obviously an arm of the City of Pittsburgh. First, its chairman and each of its board members, who establish rates for and control the operations of all Authority facilities, are appointed by the Mayor of the City and are directly responsible to his office. Parking Authority Law, *supra*, at 53 P.S. §348. Second, upon the termination of the existence of the Public Parking Authority, its properties will pass to the City of Pittsburgh. Parking Authority Law, *supra*, at 53 P.S. §354. Third, it is a matter of public record that from 1966 through 1970, inclusive, the City of Pittsburgh has derived revenues from the operation of the Public Parking Authority in the amount of $1,626,154.00. See Annual Report of the City Controller for Fiscal Year Ended December 31, 1966, at p. 30; 1967 at p. 30; 1968 at p. 36; 1969 at p. 36; 1970 at p. 37; all of which are public records on file in the offices of the City. Fourth, the debt of the Public Parking Authority is computed as a debt of the City for purposes of the total debt limitations of the City under the provisions of the Local Government Unit Debt Act, 1972, July 12, P.L. 185, §101, 53 P.S. §§11-202, 209.410. In fact, the only relevant factor pertaining to the Public Parking Authority which is not related directly to the operations of functions of the City of Pittsburgh is the legislative enactment by which the Authority could come into existence—at the sole option of the local government body. 53 P.S. §342. Finally, in its brief in *McGillick* v. *City of Pittsburgh, supra*, the City of Pittsburgh argued that the Authority was merely its alter ego and that to tax it would be to take money from one pocket and transfer it to the other. Brief for Defendant, p. 22, *McGillick* v. *City of Pittsburgh, supra*. This is precisely the finding of the Pennsylvania Supreme Court in the instant case:

> "Even if the Authority had to pay the tax to the City it would mean only in reality an accounting transaction, transferring dollars from one pocket of an instrumentality of City government to another." (P. 21a, n.9).

This construction of Pennsylvania law by its highest state court is controlling here.

others—was $3.00 in 1970 (A. 598a, 561a), while the rate for the same interval at three competing Public Parking Authority garages at Bigelow Boulevard, Third Avenue and Ninth Street, was only $2.00 (A. 537a).

The most thorough compilation of Public Parking Authority and private rates is contained in the June, 1970 report by national parking experts Wilber Smith & Associates, who were retained to make the study by the Public Parking Authority of Pittsburgh itself (Pl. Ex. 11, A. 614a). The report is reprinted in full at pages 614a through 686a of the Appendix. Table 3, reproduced at page 633a of the Appendix, clearly demonstrates the disparities between the rates charged by the Public Parking Authority and private operators:

"TABLE 3[24]

AVERAGE PARKING RATES

Interval	*Public Lots*[1]	*Public Garages*[2]	*Parking Authority Garages*[3]
1-Hour	$0.63	$0.70	$0.35
2-Hours	0.97	0.92	0.51
3-Hours	1.25	1.15	0.83
All-Day	1.97	2.11	1.73

(1) 20 public lots.
(2) Eight upblic garages.
(3) Eight Parking Authority garages."

The table establishes the fact that the short-term parking rates of the Parking Authority garages, which Donald M.

24. In this table, *respondents'* facilities are referred to as "public lots" and "public garages" as distinguished from the Parking Authority Garages.

McNeil, the leading parking expert in the City of Pittsburgh, testified is the critical factor for a "successful financial program" (A. 341a), are an average of one-half the private operators' rates, and that for any interval the Public Parking Authority substantially undercuts the rates of its private competitors (A. 632a-635a, 598a).[25]

---

25. Petitioner's contention (Pet. Br. 48) that it introduced evidence that the 20% tax could be passed on, because of the City's experience at its own wharf facility is baseless. First, the City is exempt from the 20% tax (A. 429a). Second, the City raised its all-day parking rate on its own small wharf lot from 75 cents to $1.50, after the City Treasurer concluded "this was too big of a bargain" (A. 427a). The City relies on the fact that there was little decrease in the number of customers using the City lot after the rate increase. This is hardly surprising, however, since the City's lot, even at its increased rate of $1.50 a day, was still a $1.00 cheaper than the rates charged in respondents' locations as well as those charged by its own Public Parking Authortiy (A. 427a-429a). Accordingly, the City's raising its absurdly low parking rate to a level still far below the rate charged by any other parking facility in Pittsburgh is meaningless.

The City also attempts to minimize the great disparity between public and private rates by citing a Parking Authority study which indicated a deficiency of 4,100 parking spaces in Pittsburgh (A. 616a). A full reading of this study indicates that the claimed shortage is an overall deficiency and does not purport to indicate the existence of deficiencies or surpluses in the downtown section at various times of the day.

Petitioner cites Table 4 of the study (A. 640a) to the effect that private facilities are 99.2% occupied at 2:00 p.m. on a typical week day and that all facilities, including Authority garages, are occupied 102.9% at that time. Petitioner fails to point out that the table demonstrates lesser occupancy at all other times of the day, that the total capacity of these garages ranges up to 120% because of the use of aisle space and that occupancy after 4 p.m. and on weekends is unreported. Most important, the City fails to make any mention of the main conclusion of this study: "The data show that the percentage of spaces occupied was about 10% higher throughout the day in the Authority garages than in other public facilities" (A. 638a). This finding directly supports respondents' contention regarding the disparity of rates.

Conclusion

For the foregoing reasons the decision of the Supreme Court of Pennsylvania should be affirmed.

March 23, 1974

LEONARD BOREMAN
RICHARD H. MARTIN
Attorneys for Respondents

LEONARD M. MARKS
ERIC BREGMAN
Special Counsel for Respondent Meyers Bros. Parking-Central Corporation

Of Counsel:

BASKIN, BOREMAN, WILNER, SACHS, GONDELMAN & CRAIG

GOLD, FARRELL & MARKS